



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1761 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 6th February, 2020)

SUSAN MISOKA A.K.A SUSAN KWETILIKUNDA.....CLAIMANT

VERSUS

VEGPRO KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 30th September, 2015, where the Claimant states that she was unlawfully and unfairly terminated from the Respondent's employment. She further contends that the Respondent failed and/or ignored to pay her terminal benefits at the time of her separation.
2. In her Memorandum of Claim, the Claimant avers that she was employed by the Respondent herein a limited liability company on 1st December, 2003 in its sorting department earning an average daily wage of Kshs. 471/- totaling to Kshs. 14,130/- per month.
3. She further avers that she performed her duties diligently and to the Respondent's satisfaction until 22nd April, 2015 when the Respondent through its Human Resource Manager verbally terminated her services.
4. The Claimant further avers that during the subsistence of her employment with the Respondent she did not proceed on annual leave and was not provided with any housing or provided with allowance in lieu thereof.
5. She further contended that the Respondent's actions amounted to summary dismissal from employment which was unfair, unlawful and contrary to the provisions of the Employment Act, 2007.
6. Aggrieved by the Respondent's decision to terminate her services the Claimant filed the instant Claim seeking the following reliefs:-
 - a) *A declaration that the Respondent's aforesaid actions amount to unlawful summary dismissal for employment.*
 - b) *A declaration that the Claimant is entitled to payment of her terminal dues and compensatory damages as pleaded.*
 - c) *An order for the Respondent to pay the Claimant her due terminal benefits and compensatory damages totaling to Kshs. 696,609/=*
 - d) *An Order that the Respondent provides the Claimant with a Certificate of Service.*
 - e) *Interest on (c) above from the date of filing suit till payment in full.*
 - f) *Cost of this suit plus interest thereon.*
7. In response to the Memorandum of Claim, the Respondent filed its Statement of Response on 15th May, 2018, in which it contends that it did engage the Claimant as a casual worker and was therefore not entitled to annual leave or housing allowance.
8. It is further the Respondent's contention that the Claimant was entitled to wages at the end of every shift and that she is not entitled to the reliefs sought in her Claim by virtue of her temporary engagement with the Respondent.

9. It is on this basis that the Respondent urged this Honourable Court to dismiss the instant Claim with costs to the Respondent.

10. The matter was thereafter fixed for hearing on 31/10/2019 with the Claimant testifying on her own behalf and the Respondent calling one witness to testify on its behalf.

Evidence

11. The Claimant, CW1 testified that she was employed by the Respondent herein from 1/12/2003 as a casual labourer. She further testified that she was earning a daily salary of Kshs. 471/-. She also stated that she worked continuously for the Respondent from then to 22/4/2015.

12. CW1 further testified that the on 22/4/2015 she went to the notice board at the Respondent's premises and found a list of employees including her name and was informed that her services were no longer required.

13. CW1 further stated that she sought for an explanation from her supervisor who in turn referred her to the Human Resource Manager. She did not get any explanation as they were referred to the manager and none of the officials of the Respondent gave the explanation. She testified that they were informed that they were being terminated because they failed to meet the target.

14. CW1 stated that no target was ever given. She further stated that she was not given any show cause prior to her termination and was also not taken through any disciplinary hearing.

15. CW1 further stated that she never proceeded on leave and was not paid any leave allowance in lieu thereof during the 11 years of her service to the Respondent. She further averred that she was not a member NSSF and was not paid any of her terminal dues at the time of her separation.

16. She produced a certificate of medical examination and a certificate of training both issued by the Respondent as proof of her employment with the Respondent. She urged this Honourable Court to allow her Claim as pleaded.

17. On cross-examination, CW1 confirmed that she was employed by the Respondent doing sorting work. CW1 further confirmed that she was not issued with any contract or staff id. She also confirmed that she was paid on a daily basis and was never issued with any payslip.

Defence Case.

18. The Respondent called one witness **John Matanyi RW1**, the Human Resource Manager at the Respondent Company confirmed that the Claimant was engaged by the Respondent as a casual employee on a need to need basis.

19. RW1 further urged this Court to adopt his witness statement filed in Court on 15th May, 2018 as his evidence in chief. In his statement, RW1 reiterated the averments made in the Response to the Claim as her evidence in chief. He further urged this Court to dismiss the Claim with costs.

20. On cross-examination, RW1 confirmed that the Claimant was engaged on and off basis since 2013. He further confirmed that the Claimant was paid on a daily basis for work done.

21. The Respondent urged the Court to dismiss the instant Claim with Costs.

22. The parties thereafter filed and exchanged their written submissions to this Claim.

Submissions by the parties

23. The Claimant submitted that she was not a casual labourer having been engaged by the Respondent for more than twenty four hours at a time. She further submitted that having worked continuously for the Respondent for more than three months, her engagement was subject to conversion by dint of Section 37 (1) of the Employment Act, 2007.

24. The Claimant further submitted that her termination was contrary to the mandatory provisions of Sections 41, 43 and 45 of the Employment Act, 2007. To buttress this argument the Claimant relied on the cases of **Walter Ogal Anuoro Vs Teachers Service Commission (2013) eKLR**, **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Vs Mombasa Sports Club (2014) eKLR** and **Kenfreight (E.A) Limited Vs Benson K. Nguti (2016) eKLR**.

25. The Claimant further contended that she is entitled to the reliefs sought in her Memorandum of Claim. She submitted that she was entitled to notice by dint of Section 36 of the Employment Act, 2007.

26. The Claimant further contended that she is entitled to the relief of untaken/Unpaid leave as the same remains owing to her. She relied on the provisions of Section 28 of the Employment Act, 2007 for emphasis.

27. On the relief for house allowance, the Claimant contended that she is entitled to the same and placed reliance on the provisions of Section 31 of the Employment Act, 2007.

28. The Claimant submitted that she is entitled to the relief of service/gratuity having testified that during her entire period of service with the

Respondent, she was not a member of NSSF and no deductions were made to the said authority. The Claimant contended that this Claim is therefore payable under Section 35 (5) of the Employment Act, 2007.

29. The Claimant further submitted that she is therefore entitled to the reliefs as sought by dint of Section 49 of the Employment Act. She further urged this Honourable Court award her the maximum compensation of 12 months' salary for unfair and unlawful termination of her employment.

30. In conclusion, the Claimant urged this Honourable Court to allow her Claim as drawn.

Respondent's Submissions

31. The Respondent on the other hand submitted that the Claimant's engagement with it was that of a casual labourer as defined under Section 2 of the Employment Act, 2007 and therefore Sections 7 to 16 of the Employment Act do not apply to her. To fortify this argument the Respondent cited and relied on the judicial decision in the cases of **Francis Runji Karingi & 5 Others Vs China Hebei Water Conservancy Engineering Bureau (2014) eKLR** and **Kenya Union of Sugar Plantation and Allied Workers Vs West Kenya Sugar Company Limited (2018) eKLR**.

32. The Respondent further submitted that the Claimant cannot rely on the provisions of Section 37 of the Employment Act, 2007 as she failed to avail any documentary evidence to demonstrate that she was an employee of the Respondent.

33. It is further contended that no complaint was filed with the labour officer in terms of Section 37(4) of the Employment Act, 2007.

34. The Respondent further submitted that this Court lacks jurisdiction on the conversion of the Claimant's terms of engagement from casual to term contract as the same has not been pleaded by the Claimant.

35. The Respondent further contended that parties are bound by their pleadings. To buttress this argument the Respondent cited several judicial decisions among them **Abdul Shakoor Sheik Vs Abdul Majied Sheikh & 2 Others LLR No. 2219 (CAK), Captain Harry Grandy Vs Caspar Air Charters Limited Civil Appeal (1956) 23 EACA 139, Thomas De La Rue (K) Limited Vs David Opondo Omutelema (2013) eKLR** and **Rapid Kate Services Limited Vs John Mutisya & 2 others (2018) eKLR**.

36. The Respondent submitted that the Claimant being a casual worker, the provisions of Sections 41, 43 and 45 of the Employment Act, 2007 do not apply to her.

37. The Respondent further contended that the Claimant is not entitled to the Claim of unfair termination as prayed in her Memorandum of Claim. For emphasis the Respondent cited and relied on the case of **Kenya Union of Sugar Plantation and Allied Workers Vs West Kenya Sugar Company Limited (2018) eKLR** where the Court cited the case of **Rashid Odhiambo Alogoh & 245 Others Vs Haco Industries Limited** where it was stated:-

"...As casuals, the applicants were clearly not entitled to all the allowances (e.g housing, leave, maternity etc) paid to permanent employees and the Respondent was under no obligation to make any statutory deductions for casual employees..."

38. The Respondent further submitted that there is no law that provides for the benefits claimed by the Claimant, as she was a casual worker as opposed to a permanent continuous employee.

39. In conclusion, the Respondent submitted that the Claimant is not entitled to the reliefs sought in her Claim and therefore urged this Honourable Court to dismiss the same with costs to the Respondent.

40. I have examined all the evidence and submissions of both Parties. The issues for this Court's determination are as follows:-

- 1. Whether the Claimant was a casual or permanent employee.***
- 2. If permanent, whether his termination was carried out lawfully and fairly.***
- 3. Whether the Claimant is entitled to remedies sought.***

41. On the 1st issue, the Claimant's case is that she worked for Respondent from 1st December 2003 to 22nd April 2015, a span of 13 years continuously and could therefore not be a casual employee.

42. The Respondent contends that she worked on and off and was just a casual employee.

43. The Claimant chose to rely on her Appendix 5, which shows that she was employed by the Respondent. She also submitted her Appendix 6, which shows that the Respondent also trained her in 2007 as their employee.

44. The Respondent though indicating that the Claimant worked on and off failed to present to Court the muster roll to show how she worked. It is the duty of the employer to keep employees records and the failure by the Respondent to produce such records is an indication that such documents do not exist or if produced would be prejudicial to their case.

45. Section 37 (1) (a) and (b) of the Employment Act 2007 states as follows:-

1) “*Notwithstanding any provisions of this Act, where a casual employee:-*

a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

46. In the absence of any evidence to the contrary that Claimant worked for the Respondent since 2003 to 2015, she ceased to be a casual employee after doing the same job over and over again beyond 3 months and so she cannot be considered a casual worker. I therefore return the verdict that the Claimant was not a casual worker but a permanent employee.

47. On issue No. 2, the Claimant therefore being a permanent employee, she could not be terminated without following due process. She was subject to the provision of Section 43 and 41 of Employment Act 2007 which envisages that an employee should not be terminated and that due process must be followed.

48. I therefore find that the Claimant having been terminated without due process and without any proof that there were valid reasons to terminate her. I find her termination unfair and unjustified as provided for under Section 45(2) of Employment Act 2007 which states as follows:-

2) “*A termination of employment by an employer is unfair if the employer fails to prove:*

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason:-

i) related to the employee’s conduct, capacity or compatibility; or

ii) based on the operational requirements of the employer; and

c) that the employment was terminated in accordance with fair procedure”.

49. In terms of remedies, I find for the Claimant and I award her as follows:-

1. 1 month salary in lieu of notice = 14,130/=

2. Leave not taken for the preceding 3 years before termination the rest of the year being time barred = $3 \times 14,130 = 42,390/=$

3. House allowance not paid for the preceding 3 years before termination the rest of the period being time barred = $15/100 \times 14,130 \times 36 = 76,302/=$

4. Gratuity for 13 years = $\frac{1}{2} \times 14,130 \times 13 = 91,845/=$

5. 8 months’ salary as compensation for the unlawful and unfair termination = $8 \times 14,130 = 113,040/=$

TOTAL = 337,707/=

Less statutory deductions

6. Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 6th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochwa holding brief Okweh Achiando for Respondent

Claimant – Absent